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Supreme Court of the United States

October Term, 1954

No. 387

JAMES P. MITCHELL, SECRETARY OF LABOR UNITED STATES DEPARTMENT OF LABOR

Petitioner

versus

C. W. VOLLMER & CO., INC.

Respondent

On Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTION PRESENTED

The question presented for review is whether employees engaged in initial construction of a lock for a proposed new canal, which, if completed and connected to existing navigable interstate waterways, will become a new navigable waterway in interstate commerce, are "en-

gaged in commerce" within the purview of the Fair Labor Standards Act, or are not included therein because at the time their work was performed, the lock and the canal had never been susceptible of use in interstate commerce.

STATEMENT OF THE CASE

Petitioner brought this action to enjoin respondent from violating the overtime and record-keeping provisions of the Fair Labor Standards Act.[1] The district court denied this relief on the ground that respondent's employees were not within the coverage of the Act.[2] The court of appeals affirmed this holding,[3] and this court granted certiorari.[4]

The employees of respondent whose work is the subject of this action, were employed in the performance of a contract between respondent and the United States for initial construction of an earthwork embankment and concrete platform, and derrick footings for emergency dam storage, for Algiers Lock, in the Parish of Orleans, Louisiana.[5]

The lock is being constructed as part of a proposed new canal, which is to provide an alternate connection between the Mississippi River (at a point 4.7 miles downstream from the Industrial Canal at New Orleans) and the existing Gulf Intracoastal Waterway (at a point a

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[1] 29 USC 207(a), 211(c), and 215(a)(2)(5).
[2] R 53-57, 113 FS 235 (1953).
[3] R 64, 214 F2d 132 (1954).
[4] 348 US 886.
[5] Plaintiff's Exhibit 7 (contract) and 8 (specifications).

short distance west of its juncture with the Harvey Canal, which provides one of the three present connections).[6]

The proposed new canal will be a land cut, nine miles long,[7] and will not follow any pre-existing route.[8] When and if completed,[9] it will not replace any existing canal or other navigable waterway;[10] but, when and if connected with the present Gulf Intracoastal Waterway and the Mississippi River, the proposed canal will provide a completely new, alternate route for vessels which desire to by-pass the Port of New Orleans.[11]

When and if completed and placed in service, the new lock and canal are expected to provide through east-west water traffic on the Gulf Intracoastal Waterway, with by-passage around the port of New Orleans, faster and safer than now provided through the port by the Mississippi River between the existing Harvey Lock and Canal and the Industrial Canal.[12] This new alternate con-

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[6] Sen. Doc. No. 188, 78th Cong., 2d Sess. (Plaintiff's Exhibit 6), pp. 4, 12. One of the other alternate connections, 58 miles in length, leads from the River, at Plaquemine, Louisiana, approximately 110 miles up-stream from New Orleans, to the Waterway, at Morgan City, Louisiana, approximately 100 miles westerly of New Orleans (Sen. Doc. No. 188, p. 3; see R 48). The third alternate connection is the Atchafalaya River, which connects the Waterway at Morgan City with the Mississippi River near Simmesport, Louisiana, up-stream from Baton Rouge, Louisiana, at the confluence of the Atchafalaya, Red and Old Rivers.

[7] Sen. Doc. No. 188, p. 12.

[8] *Ibid.*, also R 51, 54.

[9] See footnote 18, *post*.

[10] R 49, 54. Sen. Doc. No. 188 describes the project as an "alternate connection".

[11] R 40, 42, 54; Sen. Doc. No. 188, p. 4.

[12] Sen. Doc. No. 188, p. 4. North-bound traffic from the west is expected to continue to utilize the present alternate connections provided by the Atchafalaya River, the Plaquemine Lock and Canal and the Harvey Lock and Canal. North-bound traffic from the east is expected to continue its present practice of continuing up the River after leaving the Industrial Canal (R 41, 42, 48).

nection also is expected to increase the dependability of the waterway by providing an alternate route should the Harvey Lock and Canal become inoperative.[11]

When the work here in question was performed, the lock structure itself had only been built partially, the canal had not yet been excavated, and construction of other parts of the project had not yet even been undertaken;[14] so that no portion of the project had ever been, or could in fact ever have been, used in commerce.[15]

Although Congressional authority for the project had been granted,[16] appropriations for financing its construction were inadequate;[17] and completion of the project for actual use was, at the time respondent completed its contract, subject to further appropriations by the Congress.[18]

SUMMARY OF ARGUMENT

When Congress enacted the Fair Labor Standards Act to apply to employees "engaged in commerce or in the production of goods for commerce", it refrained from defining these terms, and purposefully left to the courts the independent responsibility of delineating the scope to be given to the Act's jurisdictional standards.

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[13] Sen. Doc. No. 188, pp. 4, 5; 13.
[14] R 48-51, 54, 57.
[15] R 36, 48-57.
[16] Act of March 2, 1945, c. 19., P.L. 14 (Rivers and Harbors Act, 1945).
[17] R 50.
[18] R 46-47, 50; Plaintiff's Exhibit 8 (specifications), pp. 8-9.

Thus called upon to determine the extent of the "engaged-in-commerce" concept of the Act, this court adopted, and has since followed, the "practical test" evolved in cases arising under the Federal Employers' Liability Act.

That test is not whether the activities of the employee affect commerce, but whether they actually are "in" or "so closely related as to be in practice and in legal contemplation a part of" interstate commerce.

Judged by that practical test, employees engaged in the construction of new facilities not yet susceptible of use in interstate commerce, though intended ultimately for such use, are not "engaged in commerce" within the purview of the Act.

This result is in harmony with past decisions of this court, the near-unanimous opinions of the lower federal courts, and the intention of Congress that the Act be not applied to employees whose work is essentially local.

ARGUMENT

Background

When Congress enacted the Fair Labor Standards Act, it "did not choose to exert its power (over commerce) to the full by regulating industries and occupations which affect commerce";[19] and expressly refused to extend the

[19] *Overstreet vs North Shore Corp.*, 318 US 125, 128 (1943). See also: *Kirschbaum vs Walling*, 316 US 517, 522-23 (1942); *Walling vs Jacksonville Paper Co.*, 317 US 564 (1943); *McLeod vs Threlkeld*, 319 US 491, 493 (1943).

Act to employees "engaged in commerce (or) in any industry affecting commerce", or in the "interstate production (of goods) which competed with goods produced in another state".[20]

Congress also rejected a proposal to extend the Act to "occupations in interstate commerce, in the production of goods for interstate commerce, or otherwise directly affecting interstate commerce";[21] and, beyond doubt, the ultimate "selection of the smaller groups" in establishing the jurisdiction of the Act "was deliberate and purposeful".[22]

For various reasons recorded in the legislative debates, Congress deliberately refrained from defining the scope of the Act with any degree of particularity, and left to the courts "the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of industrial situations".[23]

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[20] *Kirschbaum vs Walling*, 316 US at 522-23. Constitutional power to extend the Act over such employees had already been recognized in *Virginian Railway Co. vs Federation*, 300 US 515 (1937), and *Labor Board vs Jones & Laughlin*, 301 US 1 (1937), and some members of the Congress even predicted that this court would use these decisions as a guide in defining the scope of the act as first proposed: Senator Wagner stated, "My prediction is that the same workers who the courts have held to be in or directly affecting interstate commerce under the National Labor Relations Act will be regarded as subject to the federal commerce power under the provisions of the bill which we are now considering". *83 Cong. Rec., 75th Cong., 3rd Sess.*, p. 9173. Senator (now Mr. Justice) Minton had made the same prediction (*Id.*, at pp. 9170-72). Congressional rejection of this fringe coverage carried with it the annulment of this prediction. Petitioner concedes as much (petition for certiorari, p. 20, footnote 6).

[21] *83 Cong. Rec., 75th Cong., 3rd Sess.*, pp. 7373-7448.

[22] *McLeod vs Threlkeld*, 319 US at 493.

[23] *Kirschbaum vs Walling*, 316 US at 523. *83 Cong. Rec., 75th Cong., 3rd Sess.*, pp. 9168, 9173.

This court has accordingly been required to "mark out the extent to which Congress has exercised its Constitutional power over commerce",[24] and, in several decisions, the court has stated in practical terms the rules by which the jurisdictional standards of the Act are to be construed.

As the instant case is not concerned with coverage of the Act over employees engaged in the "production of goods for commerce", it is material to consider only those precedents dealing with application of the statute to employees "engaged in commerce".

In *Overstreet vs North Shore Corporation*, this court first undertook to define judicially the scope of the term, "engaged in commerce", as it is used in the Fair Labor Standards Act.[25]

Consistent with its previous decisions,[26] the court held that Congress did not intend the Act to extend to all employment subject to its power over commerce, "and in determining what constitutes 'commerce' or 'engaged in commerce', we are guided by practical considerations".[27]

The court noted that "a practical test of what 'engaged in interstate commerce' means has been evolved in cases

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[24] *Kirschbaum vs Walling*, 316 US at 520.

[25] 318 US 125 (1943).

[26] *Walling vs Jacksonville Paper Co.*, 317 US 564 (1943), *Higgins vs Carr Bros. Co.*, 317 US 572 (1943), both involving employees engaged in handling interstate shipments, in which the court initially recognized that Congress "did not exercise . . . the full scope of the commerce power . . . (and) plainly indicated its purpose to leave local business to the protection of the states", even if that business affected commerce (317 US at 570). In neither of these decisions, however, did the court state the limits of the "in commerce" jurisdiction of the Act.

[27] *Overstreet vs North Shore Corporation*, 318 US at 128.

arising under the Federal Employers' Liability Act", and held that "that practical test should govern here".[28]

The "practical test" had been stated in *Pedersen vs Delaware, Lackawanna & Western RR* to be whether the work "is so closely related to interstate commerce as to be in practice and in legal contemplation a part of it".[29]

In the *Overstreet* case, the court conceded that "the Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous", but saw "no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the *Pedersen* and related cases . should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress, in adopting the phrase 'engaged in commerce', had those Federal Employers' Liability Act cases brought to its attention".

Applying those principles to the case before it, with specific special reliance on the *Pedersen* decision, the court held that employees of the owner of a toll road and drawbridge which formed part of an interstate highway and spanned an interstate waterway, who operated the draw, maintained and repaired the road and bridge, and sold and collected toll tickets, were so closely related to the functioning of the road and bridge as an existing artery of interstate commerce, that they were in practice and in law a part of it.[30]

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[28] Id. at 128-29.

[29] 229 US 146, 151 (1913).

[30] *Overstreet vs North Shore Corporation*, 318 US at 131-32. On the authority of this decision, the court granted certiorari and reversed *Pedersen vs Fitzgerald Co.*, 318 US 740, 742 (1943), in which a New York court had held the Wage and Hour Law inapplicable to employees engaged in repair of interstate facilities. 262 App. Div. 665; 288 NY 687. This case again reached this court on certiorari to review the proceedings subsequent to the first reversal and remand (324 US 720, fn. 53, *supra*).

In *McLeod vs Threlkeld,* the court reaffirmed the adoption of this "practical test", and specifically declined to extend its interpretation of "engaged in commerce" under the Fair Labor Standards Act, to coincide with the extended coverage of the Federal Employers' Liability Act under the 1939 amendment thereto.[31]

The *Pedersen* case, in which the test of coverage had initially been developed, involved an employee of an interstate railroad, "employed . . . in the alteration and repair of some of its bridges and tracks", who, at the time of his injury, was handling materials for use in effecting repairs to a bridge then in use.[32]

This court held that "tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars", and expressed its "opinion that keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."[33]

However, in that case the court was particularly careful to point out that "of course, we are not here con-

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[31] 319 US 491 (1943). The amendment extended this act to cover not only employees "engaged in commerce", but also to cover those employees "any part of whose duties . . . shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or *closely and substantially,* affect such commerce" (italics added). Act of August 11, 1939, 53 Stat. 1404 (45 USC 51). The language of this amendment was patterned on the language of the opinion of this court in *Labor Board vs Jones & Laughlin,* 301 US 1, 37 (1937): "Although activities may be intrastate in character when separately considered, if they have such a *close and substantial* relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control" (italics added).

[32] 229 US at 150.

[33] *Id.* at 151.

cerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such".[34] In a subsequent decision, the court had occasion to meet the issue as to initial construction, which it had not squarely resolved in the *Pedersen* case.

In *Raymond vs Chicago, M. & St. P. Ry. Co.*,[35] the railroad, an interstate carrier, was engaged in constructing a tunnel, over two miles in length, for the purpose of "shortening its main line and making more efficient and expeditious its freight and passenger service". One of its employees was injured in the construction of the tunnel, and filed suit under the Federal Employers' Liability Act. At the time of the injury, the tunnel was not completed, and was not connected with the main line of the railroad.

The Court of Appeals for the Ninth Circuit had held that the employee "was engaged in constructing a new instrumentality. When completed it was intended to be used in interstate commerce, but as yet it was no part of the railroad line . . . and it had not become an instrumentality in interstate commerce". Quoting the language of this court in the *Pedersen* case, the Court of Appeals held that the employee was not "engaged in commerce" when injured.[36]

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[34] *Id.* at 152.
[35] 243 US 43 (1917).
[36] 233 Fed. 239 (CA 9-1916).

This court affirmed the decision of the Court of Appeals, and held that "it is certain . . . that . . . Raymond and the Railroad Company were not engaged in interstate commerce at the time the injuries were suffered".[37]

On the same day on which the *Raymond* opinion was handed down, this court held in *New York Central RR Co. vs White,* also concerned with the Federal Employers' Liability Act, that "a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad was . . . not engaged in interstate commerce".

The court specifically pointed out that "the admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce does not bring the case within the federal act".[38]

The "new construction" doctrine of the *Raymond* and *White* cases, evolved under the "practical test" of the *Pedersen* case, has since been adopted in, and applied to, suits arising under the Fair Labor Standards Act, by this court,[39] and by the Courts of Appeals for the First,[40]

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[37] 243 US at 45.

[38] 243 US 188, 191-92 (1917). The court cited both the *Pedersen* and *Raymond* cases as authority.

[39] *Reed vs Murphey,* 168 F2d 257 (CA 5-1948), rev'd on other grounds, but expressly affirmed on this point, 335 US 865 (1948). Construction of a naval training camp and depot.

[40] *Nieves vs Standard Dredging Corp.,* 152 F2d 719 (CA 1-1945). Dredging of navigation channels in previously non-navigable waters for naval base.

Second,[41] Third,[42] Fifth,[43] Sixth,[44] Eighth,[45] and Tenth[46] Circuits.

In each of these cases, in many of which petitioner in the case at bar appeared as *amicus curiae*, the argument for coverage under the Act was predicated on the same "repair and improvement doctrine" of the *Pedersen* and *Overstreet* cases which petitioner advances at bar.

In each case, however, the court carefully observed "the factual distinction between work on new construction deemed outside the channels of interstate commerce,[47] and repair, reconstruction, improvement or addition to an existing interstate facility deemed within the channels of interstate commerce".[48]

Similarly, decisions which have applied the "repair and improvement" doctrine enunciated in the *Pedersen* case,

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[41] *Scholl vs McWilliams Dredging Co.*, 169 F2d 729 (CA 2-1948). Construction of air base at Greenland.

[42] *Kelly vs Ford, Bacon & Davis, Inc.*, 162 F2d 555 (CA 3-1947). Construction of aircraft engine plant.

[43] The instant case, and *Van Klaveren vs Killian-House Co.*, 210 F2d 510 (CA 5-1954). Construction of expressway for ultimate use as interstate highway.

[44] *Koepfle vs Garavaglia*, 200 F2d 191 (CA 6-1952). Construction of expressway for ultimate use as interstate highway.

[45] *Crabb vs Weldon Bros.*, 164 F2d 797 (CA 8-1947). Construction of Alcan Highway.

[46] *Moss vs Gillioz Constr. Co.*, 206 F2d 819 (CA 10-1953). Construction of bridge which was to become a part of a new by-pass route for an interstate highway. The question has not been presented for decision in the Seventh Circuit. In the Fourth Circuit, validity of the doctrine has been recognized expressly, although held inapplicable to the case for decision. *Bennett vs Loftis Co.*, 167 F2d 286, 290 (CA 4-1948). A similar result obtained in the Ninth Circuit in *Ritch vs Puget Sound Bridge & Dredging Co.*, 156 F2d 334 (CA 9-1946).

[47] Such work "merely affects commerce". *Nieves vs Standard Dredging Corporation*, 152 F2d 719, 721 (CA 1-1945).

[48] *Moss vs Gillioz Constr. Co.*, 206 F2d 819, 821 (CA 10-1953).

and adopted in the *Overstreet* case, have invariably been limited carefully, as was the *Pedersen* decision, to preserve the integrity of the "new construction" doctrine of the *Raymond* and *White* cases.[49]

Thus, in *Walling vs Patton-Tulley Transp. Co.*,[50] the court simply noted that "the reasoning that construction upon a highway not yet utilized for interstate commerce is not work in interstate commerce does not apply", because the purpose of the work involved in that case was "to direct and channelize the current of the river" in an existing channel "to prevent erosion and to maintain the minimum depth required by commercial navigation".

Tobin vs Pennington-Winter Constr. Co.,[51] on which petitioner specially relies, involved the construction of a dam, one of the principal functions of which was to control the depth and flow of water in the existing navigable channel of the Arkansas River. The court concluded that construction of the dam was improvement of the Arkansas River as an existing interstate waterway as in the *Patton-Tulley* case, rather than the creation of a new instrumentality as in the *Nieves* case.[52]

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[49] *Fitzgerald Co. vs Pedersen*, 324 US 720, 725 (1945); *Bennett vs Loftis Co.*, 167 F2d 286, 290 (CA 4-1948); *Walling vs McCrady Const. Co.*, 156 F2d 932, 936 (CA 3-1946); *Ritch vs Puget Sound Bridge & Dredging Co.*, 156 F2d 334, 336 (CA 9-1946); *Walling vs Patton-Tulley Transp. Co.*, 134 F2d 945, 947 (CA 6-1943); *Cuascut vs Standard Dredging Corporation*, 94 FS 197, 203 (DC Puerto Rico-1950).

[50] 134 F2d 945, 947 (CA 6-1943). See *Koepfle vs Garavaglia*, 200 F2d 191 (CA 6-1952).

[51] 198 F2d 334 (CA 10-1952), cert. den., 345 US 915.

[52] The court certainly did not reject the "new construction" doctrine, for in the later *Moss* case, it applied that doctrine and drew the factual distinction between "new" construction and "repair and improvement". 206 F2d at 821 (1953).

Petitioner also cites *Fitzgerald Co. vs Pedersen,*[53] asserting that that case involved "employees on a railroad bridge project engaged in constructing 'entirely new abutments' ".[54]

Actually, in the *Fitzgerald* case, this court quoted a stipulation by the parties themselves, to the effect that the employees were "engaged in general construction work, for the construction of entirely new abutments under the two bridges where the abutments had been washed out and destroyed, as aforesaid, and for repairing the substructures of the other two bridges which had been damaged as aforesaid".[55]

The court then held that this "stipulation of facts would not seem to embrace activities not essential and a part of the main work of repair" of an existing instrumentality of interstate commerce; and the court concluded squarely that "since the uncontested facts in the record are to the effect that the respondents were actually engaged in repairing the abutments and substructure, the judgment of the state court must be sustained in this respect".[56]

Analysis

Petitioner's brief rests on two primary bases: (1) an allegation of conflict between the instant decision on the

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[53] 324 US 720 (1945). This case first reached the court in 1943 as *Pedersen vs Fitzgerald Co.*, when a state court decision was reversed on certiorari and remanded for further proceedings (318 US 740, 742, fn. 30 *supra*).

[54] Petition for certiorari, p. 18; brief p. 15.

[55] 324 US 720, 722.

[56] *Id.*, at 725. Since, as petitioner points out, "the 'new construction' argument was vigorously pressed by the employer" (petition for certiorari, p. 18, brief, p. 15 footnote), this careful limiting of the scope of the decision is particularly significant.

one hand, and decisions of the Sixth,[57] Ninth[58] and Tenth[59] Circuits on the other; and (2) a broad attack on the applicability of the "new construction doctrine" in cases arising under the Fair Labor Standards Act, particularly as applied to initial construction of instrumentalities such as highways and waterways, intended for use in interstate commerce.

The foregoing statement of the legislative and judicial history of the Act, shows that there is no conflict in principle or otherwise between the decision below and the cited decisions from other circuits. As has been pointed out, the Courts of Appeals for the Sixth and Tenth Circuits, in other decisions, have expressly recognized the validity of the "new construction doctrine" in wage-and-hour cases.[60]

In the decisions cited by petitioner as being in conflict with that below, those courts simply found, on the factual situations there presented, that new construction was not involved. In the present case, the Court of Appeals for the Fifth Circuit has found, on the different factual situation here presented, that new construction is involved.[61]

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[57] *Walling vs Patton-Tulley Transp. Co.*, 134 F2d 945 (CA 6-1943).

[58] *Ritch vs Puget Sound Bridge & Dredging Co.*, 156 F2d 334 (CA 9-1946).

[59] *Tobin vs Pennington-Winter Constr. Co.*, 198 F2d 334 (CA 10-1952), cert. den., 345 US 915.

[60] *Koepfle vs Garavaglia*, 200 F2d 191 (CA 6-1952); *Moss vs Gillioz Constr. Co.*, 206 F2d 819 (CA 10-1953). The Court of Appeals for the Ninth Circuit, in the *Ritch* case, expressly recognized the doctrine, but held it to be inapplicable to the facts of that case. As pointed out above (pp. 11, 12, fns. 39-46), the doctrine has been recognized by this court, and all of the Courts of Appeals except that for the Seventh Circuit, which has not had the question presented for decision.

[61] A similar distinction was expressly drawn in *Moss vs Gillioz Constr. Co.*, 206 F2d at 821 (CA 10-1953): "These cases (*Pennington-Winter, Patton-Tulley* and *Ritch*) serve only to illustrate the factual distinction between work on new construction deemed outside the channels of interstate commerce, and repair, reconstruction, improvement or addition to an existing interstate facility deemed within the channels of interstate commerce."

Decision of this case must accordingly turn on the court's determination as to the soundness of the cited holdings that employees engaged in initial construction of a new facility, which on completion is destined for use in interstate commerce, are not "engaged in commerce" within the meaning of that term in the subject Act.

The basis of petitioner's attack on the doctrine of these holdings, which he characterizes as a "narrow . . . artificial" doctrine, is that it violates the " 'national' concept of commerce which (the statute) embraces" and defeats the "broad national purposes" of the Act.[62]

Contrary to the expressed intent of Congress and to previous holdings of this court, petitioner would exclude from the scope of the Fair Labor Standards Act, as to employment "in commerce", only "peculiarly 'local' . . . projects" which are " 'historic functions of the individual states' (and) which practical considerations would place beyond the broad scope of commerce contemplated by the Act".[63]

Petitioner would apparently consider "national" in character any project comprehended within the commerce power, or authorized by Congress and "financed wholly or in large part by federal funds".[64]

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[62] Petition for certiorari, pp. 16, 21.

[63] *Id.* at 17.

[64] *Id.* at 17: "The peculiarly national character of both road and waterway construction is also significantly evidenced by the fact that they have long been financed wholly or in large part by federal funds." These latter suggestions (footnotes 62, 63, 64) have not been brought over from petitioner's application for certiorari into his brief. Petitioner continues, however, to aver that the project was authorized by Congress pursuant to its power over commerce (brief, pp. 3, 4) and that the work is "peculiarly 'national' in character" (brief, pp. 10, 15, 16).

As a result of such argument in the *Pennington-Winter* case[65] and in *Tobin vs Hughes Construction Company,*[66] the courts employed language which, if made the basis for decision of cases under the Act, might completely emasculate the judicially defined limits of the Act, and extend the statute "throughout the farthest reaches" of commerce in the constitutional sense, rather than commerce as comprehended by the Act.[67]

In the *Pennington-Winter* case, the opinion stated that since the broad Congressional purpose underlying the flood-control program in the Mississippi River and its tributaries was the improvement of navigation as well as flood-control, it necessarily followed that work authorized by Congress under that legislation was affected with that purpose because each project was "not to be considered as a separate construction . . . (but) as items of a single project undertaken to effectuate such purposes".[68]

Such broad language prompted a vigorous dissent by Judge Murrah, who felt that it might well be construed as tantamount to a frank holding "that because Congress is constitutionally empowered to construct such projects, the Wage and Hour Act *ipso facto* covers all those employees engaged in such activities", a construction expressly repudiated by this court.[69]

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[65] *Tobin vs Pennington-Winter Const. Co., Inc.*, 198 F2d 334 (CA 10-1952), cert. den., 345 US 915.

[66] 205 F2d 606 (CA 5-1953), cert. den., 346 US 925.

[67] In neither case was the language in question necessary to the decision, which, on factual distinctions affirmed in later decisions of the same courts, can be harmonized, as to result, with decisions of this court and of the other courts of appeal.

[68] 198 F2d at 337. The court cited cases dealing with the constitutional scope of the commerce power. *United States vs Appalachian Power Co.*, 311 US 377 (1940), *Oklahoma vs Atkinson Co.*, 313 US 508 (1941).

[69] *Id.* at 337-38.

In the *Hughes* case, with the *Pennington-Winter* decision before it, the Court of Appeals for the Fifth Circuit held (on the face of its opinion, at least) that every employee engaged in work of any character "pursuant to a comprehensive Congressional plan for the control" of the Mississippi River, is subject to the Fair Labor Standards Act.[70]

These pronouncements, and petitioner's argument at bar, necessarily involve categorical disregard of this court's holdings that "the application of the Act depends upon the character of the employee's activities", not on the overall nature of the work on which his employer is engaged,[71] and that the Act does not extend to employment which merely affects commerce, but only to that "in" commerce.[72]

Petitioner's contentions therefore require this court to re-examine its prior holdings as to the scope of the term "engaged in commerce" under the Act.

In so doing, it is appropriate to consider the course which judicial decisions have taken under those holdings, and whether or not such decisions have effectuated the purposes of the Act.

It is also pertinent to inquire as to the reaction of Congress to the interpretations placed on the Act by the courts.

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[70] *Tobin vs Hughes Construction Company*, 205 F2d 606, reh'g den. 206 F2d 505, cert. den. 346 US 925. As in the *Pennington-Winter* case, this decision can be harmonized, on factual distinctions, with the *Van Klaveren* case and the instant case, both later decided by the same court.

[71] *Overstreet vs North Shore Corp.*, 318 US 125, 132 (1943).

[72] *Supra*, pp. 5-6.

Respondent submits that the foregoing survey of decisions of federal courts construing the extent of coverage of the Act as to the term "in commerce" reveals that the "practical test" adopted by this court in the *Overstreet* case has been applied uniformly with satisfactory, harmonious results.

Since Congress intended that each case, or category of cases, should be decided with reference to its particular facts, it was inevitable that some apparent conflict should arise. But this apparent conflict results only from the occasional drawing by the courts of different factual conclusions in what would seem to be similar cases. This possibility cannot be averted as long as the "independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of industrial situations" still rests with the courts.[73]

Despite these factual distinctions, which petitioner claims have produced "anomalous results", the federal appellate courts have, without exception, had no difficulty in applying the decisions of this court delineating the extent of commerce under the Act.

Even in those cases which have presented the closest factual distinctions, the courts have expressly acknowledged the two competing lines of decision—"repair and improvement" on the one hand, "new construction" on the other; have found them to be completely harmonious with each other and workable in application; and have

[73] *Kirschbaum vs Walling*, 316 US at 523.

accordingly applied the rule which, in the court's opinion, better fitted the facts of the case presented.[74]

By this process, those activities which merely affect commerce, such as initial construction, which always has been considered inherently local in nature, have been excluded; but all activities which are in the realistic sense "a part of" the commerce involved, such as repair and maintenance of facilities used in carrying on commerce, have been included in such coverage.

Respondent submits that the judicious application by the courts of the two complementary doctrines, both developed under this court's stated "practical test", has accurately measured Congressional intention as to the scope which the coverage of those "engaged in commerce" was to have.

Proof of this conclusion is the fact that Congress has never seen fit to change the statute with respect to that coverage;[75] although amendments have altered other features of the Act, including its jurisdictional standard relating to "production of goods for commerce".[76]

Prior to the subject amendment, the only requirement under that jurisdictional standard was that the employ-

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[74] Compare *Patton-Tully* with *Koepfle*, *Pennington-Winter* with *Moss*, and see *Van Klaveren* and the opinion of the district court in the instant case.

[75] The 1949 amendments did expand the definition of "commerce" to include incoming, as well as outgoing foreign commerce, with the purpose of placing "employees of importers on an equal footing with employees of exporters". *Statement of House Conferees, House Report No. 1453, 81st Cong. 1st Sess.*, pp. 13-14. This change is not material to the point under discussion.

[76] 63 Stat. 911 (1949), 29 USC 203(j).

ment be in a "process or occupation necessary" to the production of goods for interstate commerce.

Since the requirement as to being "engaged in commerce" was not part of that segment of the Act, the courts ultimately had included in its scope almost all employees whose work affected the production of goods for commerce.

Impelled by the conviction that the courts, in such interpretative decisions, had extended the coverage of the Act far beyond its intended scope, Congress amended the law to require, for coverage under the "production" clause, that the employee be engaged in a "closely related process or occupation directly essential" to such production.[77]

It is reasonable to assume, since there was considerable unavailing agitation for amendments further extending the Act, that Congress would have expressed itself had it not been satisfied with the judicial development of the scope of the "in commerce" clause of the Act, including adoption of the "new construction doctrine".[78]

Petitioner's case is accordingly reduced to the argument that this court should now repudiate its basic holdings which delineate the scope of the "in commerce" coverage of the Act and establish the criterion for determining such coverage, although they have served as a satisfactory basis for decision for over a decade.

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[77] *Statement of House Conferees, House Report No. 1453, 81st Cong. 1st Sess.*, pp. 14-15. It is to be noted that the limiting language "closely related" is the same language used by this court in the *Pedersen* case in announcing the limits of the "in commerce" clause.

[78] The original House Bill, No. 3190, to amend the Fair Labor Standards Act, proposed a general extension of coverage, both as to employees "in commerce" and "in the production of goods for commerce", but this bill was rejected. See *House Report No. 267, 81st Cong., 1st Sess.*

Petitioner further urges the court, despite Congressional acceptance of these holdings, to overrule the unanimous opinions of the federal courts of appeal, based on these holdings, that workers engaged in initial construction of new facilities destined for ultimate use in interstate commerce are not engaged "in commerce".

As a substitute for these accepted principles, petitioner asks the court to hold that all workers on "nationally important" projects, or on projects of a "national character", are "engaged in commerce" within the meaning of the Fair Labor Standards Act.

A "practical test" offered by petitioner is whether the work has been authorized by Congress or is financed "wholly or in large part" by federal funds.

Petitioner's position finds no doctrinal support in prior decisions of this court or of the courts of appeal, and is directly opposed to the stated intention of Congress with respect to the application of the Act.

CONCLUSION

The Fair Labor Standards Act was not intended by Congress to extend to all employees in interstate commerce within the Congressional power over that commerce, but was purposely restricted to those engaged in the movement of commerce.

This court, in response to the announced purpose of Congress that it should determine the extent of the cov-

erage of the Act over employees "engaged in commerce", has held that the test was not whether the activities of the employee affected commerce—a jurisdictional standard repudiated by Congress—but was whether such activities were actually "in" or "so closely related . . . as to be in practice and in legal contemplation a part of" interstate commerce; and has referred to its own decisions under the Federal Employers' Liability Act as furnishing sound bases for decisions as to the intended scope of the Fair Labor Standards Act.

Applying these tests, and pursuant to a specific holding by this court under the Federal Employers' Liability Act, every federal court of appeals which has considered the question has held expressly, or has recognized unequivocally, that employees whose activities are in the initial construction of new facilities not yet used in interstate commerce, although actually intended for such ultimate use, are not "engaged in commerce" within the purview of the Fair Labor Standards Act.

Congress has not seen fit to amend the Act to repudiate or alter the doctrine of these decisions, although it has amended the Act in respect to its other phase of coverage to eliminate employees which the courts had included, and which Congress had not intended should be, within the Act.

The argument of petitioner that the doctrine of these cases, which formed the basis for the decision under review, is "plainly inconsistent with the basic principles" of the Act, and has "led to incongruous results", is accordingly specious.

It is therefore respectfully submitted that the employees here involved, who were engaged in initial construction of a lock for a proposed new canal, which, when and if completed and connected to existing navigable interstate waterways, will become a new navigable waterway in interstate commerce, were not "engaged in commerce" within the purview of the Fair Labor Standards Act; and that the decision under review is accordingly correct and should be affirmed.

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